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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 994

WONG YIM alias George Wong,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner, Wong Yim alias George Wong, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment of said court entered in the above entitled cause on March 22, 1941, affirming the final judgment of the District Court of the United States for the Territory of Hawaii.

OPINIONS BELOW.

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals is unreported. It appears in the record following page 267.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner was indicted with two others for unlawfully trafficking in narcotics in violation of 21 U.S.C.A., section 174. (R. 5-11.) The indictment was filed in the District Court on December 22, 1938. (R. 11.)

On January 6, 1939, petitioner filed an application for *dedimus potestatem* to take the testimony of two witnesses residing in Hong Kong, China. (R. 12-19.) His application recited that their testimony was necessary to prevent a failure of justice (R. 14) in that by their testimony an explanation would be given as to why certain moneys were sent to China by petitioner. (R. 15-17.) The motion was presented on January 10, 1939, and denied. (R. 28.)

On January 10, 1939, petitioner filed a motion to quash venire on the ground that the panel selected as prospective jurors was not "representative of the citizenry" of the Island of Oahu (the place of trial) or of the Territory of Hawaii. (R. 19-23.) The motion was presented on January 10, 1939, and denied. (R. 28.)

Trial was had on January 11, 1939 (R. 28), and petitioner was found guilty by the jury and judgment was thereafter entered. (R. 37-38.) This judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit on March 22, 1941.

JURISDICTION.

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code. (43 Stat. 938; 28 U.S.C.A., sec. 347.)

QUESTIONS PRESENTED.

(1) Did the trial court abuse its discretion in denying the application for *dedimus potestatem?*

(2) Did the trial court abuse its discretion in denying the motion to quash venire?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The application for *dedimus potestatem* was made under 29 U.S.C.A., sec. 644. It reads:

> "In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage; . . ."

With reference to this statute, the opinion recites that "Although the statute under which the application was made is an old one, few questions under it have arisen". The opinion also recites that "If the testimony of the two witnesses would be conclusive then it might be argued that a failure of justice would be prevented. However, such is not the case, for the jury (the exclusive judge of the credibility of witnesses) might choose to disbelieve such witnesses. In

such an event, the dedimus potestatem of either witness or both, would not 'prevent a failure or delay of justice'."

It is therefore the decision of the Circuit Court of Appeals that trial courts may arbitrarily deny applications under the section as juries may disbelieve the testimony of witnesses thus taken. The importance of this question requires the settlement thereof by this court.

The Circuit Court of Appeals for the Ninth Circuit has not heretofore been committed to the view above stated. It ordered a reversal in *Young Bark Yau v. United States,* 33 F. 2d 236, solely on the ground that an application for *dedimus potestatem* has been denied by the trial court. It expressed the view that availability of evidence furnished the test by which the discretion of the trial court was to be measured. The case there was clearly one in which the triers of fact could have disbelieved the testimony of the prospective witnesses. The test of availability of evidence rather than credibility of witnesses is also found in the earlier decision of said court in *Tom Ung Chai v. Burnett,* 25 F. 2d 574, 575-6.

The decision in the said Ninth Circuit are plainly not in harmony on the subject, and the importance of the question merits the intervention of this court.

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(2) THE CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY CONFLICTING WITH THE APPLICABLE DECISION OF THIS COURT.

The mixed character of the "citizenry" of the Territory of Hawaii is a matter of common knowledge.

The motion to quash the venire established that of the 35 persons selected as prospective jurors 32 were of American or Caucasian ancestry (excluding the Portuguese). (R. 20.) A tabulation of the racial percentages prevalent at the venue of the action appears in the record. (R. 21.) It is evident therefrom that over 75% of the citizenry reflects races other than Americans or Caucasians. But the venire in the present case reflected a percentage of 91% Americans or Caucasians. There is manifestly in the Territory of Hawaii a violation of the principles announced by this court in *Norris v. State of Alabama,* 294 U.S. 587. The present decision is plainly in conflict with that decision in the matter discussed.

CONCLUSION.

Wherefore petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final decree of said court in said cause be reviewed and reversed.

Dated, San Francisco, California,
April 23, 1941.

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